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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 101.

MURRAY W. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

No. 102.

HENRY M. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Murray W. Garsson and Henry M. Garsson, Petitioners, respectfully pray for a rehearing and reversal of the orders hereinbefore entered on the 10th day of October, 1949, denying their Petitions for Writs of Certiorari to the

United States Court of Appeals for the District of Columbia and as grounds for such rehearings set forth the following:

I.

That two of the principal questions presented for decision by this Court concerned the interpretation and construction of two groups of statutes: (a) R. S. 1782, March 4, 1909 c. 321 Section 113, 35 Stat. 1109, as amended (18 U. S. C. A. 203) and, (b) R. S. 102, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A. 192); R. S. 103, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A. 193), and R. S. 859, as amended June 22, 1938, c. 594, 52 Stat. 943 (28 U. S. C. A. 634). 18 U. S. C. A. Section 203 prohibits a Congressman from receiving or agreeing to receive any compensation for services in any matter in which the United States is interested. The statutes in group (b) pertain to testimony given by a witness before a Congressional Committee.

The Petitions for Writs of Certiorari in the above cases raise many questions of substance relating to the interpretation, construction or application of said statutes, were denied. It may be that this action was taken on the ground that there was no conflict of decision among the various Courts of Appeals relative thereto. Although the importance of the questions relative to these statutes was presented in the Petitions, petitioners did not argue that prosecutions elsewhere with the resulting conflict of decision was improbable because such statutes would be most likely to be violated only in the District of Columbia. Because of the concentration of Governmental departments, bureaus and agencies in the District of Columbia, and of the time spent by members of Congress in said District, it is most probable that 18 U. S. C. A. Section 203, if violated, would be violated in that District. Also, because of the existence of the foregoing facts, Congressional investigations will be held most probably in said District rather than elsewhere in the United States.

This Court's attention is called to the fact that this case was the first prosecution by the Government under 18 U. S. C. A. 203 of a person other than a Congressman, against whom the prohibition of that Section is specifically directed. There is no decision by this Court on the question whether any one other than a Congressman may be indicted under 18 U. S. C. A. 203 as an aider and abettor. In the absence of the probability of a conflict of decision in other Courts of Appeal, and in view of the probability that such prosecutions will be brought only in the District of Columbia, it is important to the administration of justice that this Court grant certiorari in these cases in order that an important question of Federal administration be decided and settled.

The preceding ground for rehearing constitutes a substantial ground, which was available to petitioners although not previously presented in their Petitions for Writs of Certiorari. Said ground is analogous to that presented in the petition for rehearing in the case of *Schriber-Schroth Company* v. *Cleveland Trust Company,* 305 U. S. 47, 573; 59 S. Ct. 810, in which this Court granted certiorari on a petition for rehearing showing that, notwithstanding the doubtful validity of certain patents, "litigation elsewhere with the resulting conflict of decision was improbable because of the concentration of the automobile industry in the 6th Circuit."

II.

That a further reason for granting a rehearing is an intervening circumstance of substantial and controlling effect —that since the filing of the Petitions on June 3, 1949, the Supreme Court, on June 27, 1949, in the case of *Eugene Dennis, Petitioner* v. *United States of America,* at No. 436, October Term, 1949, granted a Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia, limited to the question whether Government employees could properly serve on the jury which tried the petitioner.

This decision by this Court bears on the question presented in petitioners' briefs (Henry M. Garsson Brief, 75-79, Murray W. Garsson Brief, 15) whether the petitioners were indicted by an illegally constituted Grand Jury. The Court of Appeals in summarily rejecting petitioners' challenge of the composition of the Grand Jury on the ground that is consists of more than half of Government employees, and that two of its members were completely disqualified, followed the decision in *Frazier* v. *United States,* 335 U. S. 497, that Government employees are eligible to sit as jurors.

The Court of Appeals in the *Dennis* case, 171 Fed. (2d) 986, 991-992, upheld the District Court's action in overruling the challenge of all talesmen who were Government employees. Petitioners maintain that the granting by this Court of certiorari in the *Dennis* case shows a departure from its decision in *Frazier* v. *United States,* 69 S. Ct. 201. This Court's action shows a growing apprehension and realization of the obstacles to a fair trial presented by a petit jury composed principally of Government employees. This Court's attention is also called to dissenting opinions by Judges Jackson, Frankfurter, Douglas and Murphy in the *Frazier* case. Mr. Justice Jackson particularly pointed out the danger of a "packed jury" where the offense was against no one except Federal Government policy, i.e. the Secretary of the Treasury. Judge Jackson, in his dissenting opinion, states, 69 S. Ct. 201, 210:

> "On one proposition I should expect trial lawyers to be nearly unanimous: that a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury. A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts."

The dangers inherent in the Grand Jury investigation and in the trial of cases in the District of Columbia involv-

ing offenses against no one except Federal Government policy—[in these cases, particularly against the General Accounting Office]—make it impossible for defendants charged with such offenses to receive a fair trial in said District at the hands of either a Grand Jury or a petit jury composed largely of Government employees. The Mead Committee investigation, which preceded the Grand Jury investigation and the trial itself, publicized unsworn and rash statements made by members of the investigating committee. The publicity given to the Mead Committee hearings was so widespread that no one in the District of Columbia at that time could have been ignorant of the charges made against these defendants. Comments made by members of the Committee were powerful enough to prejudice both the Grand Jurors and the petit jurors against these defendants before the trial even started.

Objections were made in these cases to the composition of both the Grand Jury and the petit jury. Said juries had a one-sided outlook on the case before them. The petitioners were deprived of a fair and impartial trial not only because they were tried by a jury, most of those members were prejudiced against them, but also by jurors whose minds could not have helped but be biased against the petitioners as a result of comments made during the Mead investigation.

In view of this Court's action in granting certiorari in the *Dennis* case, limited to the question whether Government Employees could properly serve on the jury which tried petitioner therein, petitioners in the above cases maintain that there is more reason for granting certiorari in their cases—because in the *Dennis* case at least the defendant had the opportunity to examine the petit jurors for possible bias. Such an opportunity was not available in the case of the Grand Jury which indicted our petitioners.

III.

That a further reason for granting a rehearing as to petitioner Henry M. Garsson is that since the filing of his Petition, the Government in its brief (Br. 28-31) admits that petitioners May and Henry Garsson both testified before the Senate War Investigating Committee prior to their indictment concerning various matters relating to the facts in this case, that Henry Garsson appeared under subpoena, and, "made a general statement claiming and refusing to waive 'his constitutional privilege' (against self-incrimination)" (R. 161-162, 164). Although the Government contends that the two statutes involved, 28 U. S. C. A. 634 and 2 U. S. C. A. 192 do not "spell out" immunity from prosecution "for or on account of any transaction, matter, or thing" concerning which testimony is given before a Congressional Committee, nevertheless it does stress that Henry Garsson "did not refuse to answer any question; so far as the record shows he was not compelled" (R. 164). The Government's position is thus most inconsistent. It recognizes by the last statement that the statutes do grant immunity; otherwise it would not have had to argue that Henry Garsson "did not refuse to answer any question" after he had made a general statement claiming and refusing to waive his constitutional privilege. Respondent argues that Henry Garsson did not obtain immunity because he was not compelled to give the testimony which he did. This argument and the decision in the Court below on this point are difficult to understand.

This Court has ruled in *Smith* v. *United States*, 292 1948 Term decided May 31, 1949, 69 S. Ct. 1000, and in *United States* v. *Monia*, 317 U. S. 424, that it is not necessary for a witness each time a question is asked to raise the constitutional question involved and then be forced to answer before immunity attaches in the giving of testimony before a Congressional Committee. The Government's argument that the statutes herein relied on to give petitioner Henry Garsson immunity—28 U. S. C. A. 634, and 2 U. S. C. A.

192—are not comparable to the statutes involved in the *Smith* and *Monia* cases is fallacious.

Next the respondent argues that no immunity statute has been enacted relative to testimony before a Congressional Committee and that, consequently, neither May nor Henry Garsson could have been compelled to incriminate himself before the Mead Committee, if he raised the constitutional question. And yet in two recent cases, wherein Petitions for Writs of Certiorari are pending in this Court, *Lawson* v. *United States* and *Trumbo* v. *United States*, 176 Fed. (2d) 49 (C. C. A. D. C.) the Government brought prosecutions for violations of 2 U. S. C. A. Section 192, 52 Stat. 942 (1938), which makes it a misdemeanor to refuse to answer "any question (of a Congressional Committee) pertinent to the question under inquiry". Thus, using the very statutes herein involved, respondent indicted, tried and convicted for contempt witnesses before Congressional Committees, who, in reliance upon their constitutional right, refused to answer questions put to them by such Committee.

The position of the Solicitor General in upholding the constitutionality of 2 U. S. C. A. 192 in the *Lawson* and *Trumbo* cases and, in effect, attacking the constitutionality of the same statute in our cases because it is not an immunity statute within the so-called definitions of the *Smith* and *Monia* cases, presents a question of importance in the administration of Federal criminal justice which should be decided by this Court.

Petitioner Henry Garsson maintains that he comes within the protection given by this Court to the defendant in the *Smith* case, because it is plain that he relied from the beginning of his examination upon his privilege against self-incrimination. The United States had notice that the witness sought protection against prosecution for any facts to which he was compelled to testify. As stated by this Court, 69 S. Ct. 1000, 1007: " . . . Although the privilege against incrimination must be claimed, when it is claimed

it is guaranteed by the Constitution. Thereafter only absolute immunity from Federal criminal prosecution is sufficient to compel the desired testimony . . . "

This is the first time the Supreme Court has been called upon to pass upon the immunity of a witness, who has testified before a Congressional Committee after refusing to waive his constitutional rights.

Previous cases before the Court have involved immunity before other governmental bodies or juries.

A witness before a congressional committee, under the statutes can not refuse to testify even on the grounds of self-incrimination.

He may be prosecuted for contempt if he refuses to testify, and he may be prosecuted for perjury if he should testify falsely.

IV.

That respondent, in its Brief (Br. 23), argues that even if the conspiracy count is defective for the reasons assigned by the dissenting Judge in the lower Court and even if the conspiracy count is "merged" in the substantive offenses charged in Counts 3 and 4, the judgments of conviction still could not be successfully assailed because each petitioner received an identical sentence of imprisonment under each count, and all sentences were directed to be served concurrently. The Government argues that under such circumstances any good count would sustain the sentences imposed. The difficulty with this argument is that a great mass of so-called conspiracy evidence was received under Count 1—the so-called overt acts related to Count 1. This evidence, which was not admissible to prove the substantive offenses alleged in Counts 3 and 4 (*Glasser* v. *United States,* 315 U. S. 60, 73-75), was not only submitted to the jury as proof under Count 1, but was also used under Counts 3 and 4. Thus, assuming that Count 1 was defective, the petitioners were prejudiced by the jury's being

permitted to consider the testimony erroneously admitted under Count 1 as to all the counts in the indictment.

V.

That in its Brief (Br. 27-28), respondent answered petitioners' contention that the evidence was insufficient to sustain the convictions by making a sweeping statement that the Government's proof of existence of the conspiracy charged, as set forth in the Statement (Br. 5-19), is clear and compelling. The Government adroitly avoids any reference to *Glasser* v. *United States,* 315 U. S. 60, wherein this Court held that admissions of statements by conspirators in the absence of another co-conspirator cannot be used to establish a conspiracy until there is proof aliunde of the existence of conspiracy. All the evidence set forth in the respondent's Statement (Br. 5-19) pertained to alleged overt acts, done in pursuance of conspiracy, and after it was charged to have been formed. The Trial Court found that each and every of the overt acts in respondent's Statement was legal in and of itself.

The Government, by failing to point out any independent evidence in this Record to establish the conspiracy or to establish the petitioners' connection with it other than through admittedly legal overt acts, admits that no such independent evidence is to be found in the Record.

VI.

That the respondent, in its Brief (Br. 32), misstates the position of the dissenting Judge in the lower Court. The Government stated that none of the other contentions made by the petitioners "was found meritorious by the dissenting Judge, whose opinion was based entirely on what he thought were defects in the indictment." (R. 176) This is a misstatement of the fact, for the reason that Judge Stephens, the dissenting Judge, did not even consider these points, as his decision held the indictment and the convic-

tions thereon invalid and, therefore, he did not believe it necessary to consider the other points raised. As stated by Judge Stephens:

> "The defects which I think exist in the indictment are obviously of substantial character and cannot therefore be disregarded under 18 U.S.C. § 556 (1940) or Rule 52(a), Federal Rules of Criminal Procedure. A precedent supporting an indictment with such substantial defects should I think not be set."

CONCLUSION.

WHEREFORE, upon the foregoing grounds, the petitioners respectfully pray that this Petition for Rehearing be granted, and that the orders heretofore entered by this Court on October 10, 1949 denying their Petitions for Writs of Certiorari to the Court of Appeals for the District of Columbia, be reversed.

Respectfully submitted,

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Certificate of Counsel

We, SAMUEL GOLDSTEIN, attorney for Petitioners, and PERRY W. HOWARD, of counsel for Petitioner Murray W. Garsson, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and further, that the Petition is restricted to the grounds specified in Amended Rule 33(2) of the Rules of the United States Supreme Court.

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